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NO. 74

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

CLIFFORD TAGGART, ET AL., *Petitioners*,

v.

WEINACKER'S INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby respectfully moves for a leave to file a brief as *amicus curiae* in the instant case in support of the position of the Petitioners, as provided for in Rule 42 of the Rules of this Court. The consent of counsel for the Petitioners has been obtained. Counsel for the Respondent has refused his consent.

INTEREST OF THE AFL-CIO

The AFL-CIO is a federation of one hundred and twenty affiliated labor organizations with a total membership of approximately thirteen million five hundred thousand.

The questions presented in the instant case are of great importance to the continued validity of the right to picket.

one of the handful of basic rights that employees have at their disposal during a labor dispute. Briefly stated, these questions are whether a State may utilize its trespass laws to prohibit peaceful picketing addressed to the public, which takes place on a thoroughfare open to the public but within the property of a privately-owned store (a single store shopping center (A 1-2)) without running afoul of the First and Fourteenth Amendments to the Constitution of the United States, the Supremacy Clause, or the pre-emption doctrine enunciated in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959).

A substantial portion of retail sales takes place at single and multi-store shopping centers which do not front on a publicly owned street and their percentage of the total market is on the increase. Thus, the decision of the court below, if sustained, could have a crippling effect on a number of the AFL-CIO's affiliates since it insulates a significant group of employers from effective peaceful picketing during a primary labor dispute involving them. For this reason the Federation requests this opportunity to present its views on the instant case to this Court.

Because of the range and complexity of the issues presented, the Petitioners have not concentrated on the relationship of this Court's decision in *Amalgamated Food Employees* v. *Logan Valley Plaza*, 391 U.S. 308 (1968) to prior First Amendment decisions. It is the AFL-CIO's view that the case for reversal here is greatly strengthened by the fact that *Logan Valley* is part of the mainstream of First Amendment law, rather than an isolated decision which could be limited to its facts without causing significant side effects. The main burden of the Federation's brief *amicus* is therefore devoted to an exploration of the place of *Logan Valley* in the overall scheme of this Court's decisions.

CONCLUSION

For the above stated reasons we respectfully urge the Court to grant this motion for leave to file the accompanying *amicus* brief in the instant case in support of the position of the Petitioners.

Respectfully submitted,

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This *amicus* brief is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), contingent upon the Court's granting the foregoing motion for leave to file a brief as *amicus curiae*.

The opinions below, jurisdiction, questions presented, and the statutory provisions involved are set out at pp. 1-14 of the Petitioners' brief.

The interest of the AFL-CIO is set out at pp. iii-v of the foregoing motion for leave to file a brief as *amicus curiae*.

ARGUMENT

THE INSTANT DECISION OF THE SUPREME COURT OF ALABAMA IS INCOMPATIBLE WITH THIS

COURT'S DECISION IN AMALGAMATED FOOD EMPLOYEES V. LOGAN VALLEY PLAZA, 391 U.S. 308 (1968).

At the time *Amalgamated Food Employees v. Logan Valley Plaza*, 391 U.S. 308 (1968) arose, Logan Valley was a newly developed shopping center (its perimeter spanned about 1.1 miles) situated near the City of Altoona, Pennsylvania, at the intersection of two heavily traveled public highways. While other occupants were expected, it was then occupied by Weis Markets, Inc (Weis) and Sears, Roebuck and Co. (Sears). Weis operated a supermarket engaged in selling food and sundry household articles and its property consisted of an enclosed modern market building with an open but covered porch running north and south along its front and a pick up zone directly along the porch for unloading purchased goods into customers' cars. Between the supermarket area and the highway berms were extensive parking lots to the east and south of Weis covering a distance from the highway entrances of 250 to 500 feet.

Weis opened for business, employing a wholly nonunion staff of employees and a week later, small groups of union members (averaging about 5-7 men and women) who were employed by nearby union markets and were not and had never been employees of Weis picketed the Weis store within the shopping center wearing placards reading "Weis Market is Non Union, these employees are not receiving union wages or other union benefits, Amalgamated Food Employees Union Local 590." They walked back and forth in front of the Weis supermarket, primarily at the pick up zone adjacent to the covered porch. The picketing did create sporadic and infrequent congestion but it was peaceful and unaccompanied by either oral threats or actual violence.

At the instance of Weis and Logan, an *ex parte* injunc-

tion was entered and continued after hearing, prohibiting all picketing within the shopping center, and in consequence limiting the picketing to the highway berms. The injunction was upheld by the Supreme Court of Pennsylvania on appeal. That Court reasoned that the picketing was a "trespass which very properly was restrained."

However, this Court reversed on the ground that the Pennsylvania decision was irreconcilable with the First Amendment. Mr. Justice Marshall wrote the opinion for the Court, Mr. Justice Douglas concurred in a brief separate opinion, Justices Black, Harlan, and White dissented; each writing a separate opinion.

The instant case arises in a strikingly similar context.

Weinacker's, Inc., conducts a general department store business for the sale of groceries, dry goods, hardware, drugs and prepared foods in a single building in Mobile, Alabama. Weinacker's owns this building and the area (approximately one third of a mile in circumference (Pet. Br. App. B)) which surrounds it. Within this area sidewalks encircle the building, walkways lead to it, and a motor vehicle parking lot (between 115 and 385 feet deep, *ibid.*) for the use and convenience of the customers in parking their automobiles is located between the front of the building and the public property which adjoins the parking lot. The main entrance to the store building fronts to the south on the private sidewalk; the adjacent motor vehicle parking lot separates the store building and the private sidewalk from a public street called Government Street. The privately owned area which surrounds the store building is bounded on three sides by public sidewalks which are adjacent to public streets. (A 91-92, 1-2)

There has never been an evidentiary hearing in *Tanner*. Nevertheless, the following seems to be the essential story

of the picketing. The Union, Retail Clerks Local 458 of Mobile, was certified by the National Labor Relations Board as the exclusive bargaining agent of a unit of Weinacker's employees, after winning a Board conducted election (A27-65). Thereafter the Company committed a long list of flagrant violations of §§ 8(a)(1), (3) & (5) of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 514, 29 U.S.C. 151 *et seq.* See *Weinacker Brothers, Inc.*, 153 NLRB 459 (1965), *enforced summarily*, No. 23,510, C.A. 5th Cir., 1966. And when bargaining failed to produce a contract, the Union struck on December 12, 1964 (A23). In support of the strike the Union picketed first on the public sidewalk and then on the walkway adjacent to the store (A91-92). From the Company's allegation it appears that there were two to three pickets. There is no dispute that the picketing was peaceful, and without any acts of actual violence or threats of violence (A91-92). However, Weinacker's contended that the picketing was obstructive and supported its position with six identically worded conclusory affidavits (A9-14). The Union denied this allegation (A87). As noted above, there was no evidentiary hearing but the Alabama courts found the picketing "had been carried on in such a manner as to obstruct [Weinacker's] customers" (A91-92). On January 22, 1965, the Circuit Court of Mobile, Alabama issued an ex parte injunction prohibiting "trespassing upon the property of . . . [Weinacker's] and . . . interfering with . . . [Weinacker's] property and right of ingress and egress to the . . . property and place of business" (A15-16). After a non-evidentiary hearing held on March 26, 1965 this injunction was continued in an opinion issued on April 1, 1969 (A90-95). On September 19, 1968, three years after the appeal was argued and submitted, the Supreme Court of Alabama affirmed the judgment of the Circuit Court (A96-121).

The foregoing makes it plain that the only factual distinction between *Logan Valley* and *Taggart* is that the shopping center here is smaller than Logan Valley Plaza and is occupied by a single large store rather than a number of stores. It is a segment of a business area equivalent to a single block in a downtown shopping area, surrounded by privately owned parking spaces, rather than an entire business complex offering a full range and variety of goods and services equivalent to those found in a traditional shopping district fronting on public streets. It is in a sense the ultimate example of the fragmentation of traditional downtown shopping areas brought about by the impact of the supermarket and the automobile. Thus the central question posed here is whether these factual distractions make a legal difference. The answer to this question turns on the nature and force of the principles upon which *Logan Valley* rests. We, therefore, turn to an analysis of the implications of that decision.

1. The Court's argument in *Logan Valley*, as we read it, proceeds through three stages. The first deals with and rejects the proposition that prior precedents culminating in *Teamsters* v. *Vogt*, 354 U.S. 284 (1957) which recognized a distinction between pure speech and picketing which involves both "speech and conduct, *i.e.* patrolling", support the conclusion that the "nonspeech aspects of peaceful picketing are so great as to render the provision of the First Amendment inapplicable to it altogether":

> "The majority of the cases from this Court relied on by respondents, in support of their contention that picketing can be subjected to a blanket prohibition in some instances by the States, involved picketing that was found either to have been directed at an illegal end, e.g., *Gibonev* v. *Empire Storage & Ice Co.*, 336 U.S. 490 (1949), . . . or to have been directed to coercing a decision by an employer which, although in itself legal,

> could validly be required by the State to be left to the employer's free choice, e.g., *Carpenters Local 213* v. *Ritter's Cafe*, 315 U.S. 722 (1942) (secondary boycott). . . . Those cases are not applicable here because they all turned on the purpose for which the picketing was carried on, not its location." (391 U.S. at 314)

In the second, Mr. Justice Marshall put to one side for the moment the question of whether thoroughfares in a shopping center should be equated with a municipally owned street in a business block to canvass the cases dealing with the First Amendment's protection of the distribution of views on the public streets. He concluded:

> "The essence of the opinions [in *Lovell* v. *Griffin*, 303 U.S. 444 (1938); *Hague* v. *CIO*, 307 U.S. 496 (1939); *Schneider* v. *State*, 308 U.S. 147 (1939); *Jamison* v. *Texas*, 318 U.S. 412 (1943)] is that streets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely.
>
> "The fact that *Lovell*, *Schneider*, and *Jamison* were concerned with handbilling rather than picketing is immaterial so far as the question is solely one of right of access for the purpose of expression of views. Handbilling, like picketing, involves conduct rather than speech, namely, the physical presence of the person distributing leaflets on municipal property. If title to municipal property is, standing alone, an insufficient basis for prohibiting all entry onto such property for the purpose of distributing printed matter, it is likewise an insufficient basis for prohibiting all entry for the purpose of carrying an informational placard. While the patrolling involved in picketing may in some cases constitute an interference with the use of public property greater than that produced by handbilling, it is clear that in other cases the converse may be true." (391 U.S. at 315-316)

This portion of the Court's opinion then goes on to explore the nature and rationale for permissible state regulation of the "public forum", see, H. Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 Supreme Court Review 1. The State may regulate "the exercise of First Amendment rights . . . on property open to the public generally . . . so as to prevent interference with the use to which the property is ordinarily put by the State . . . *Cox* v. *Louisiana*, 379 U.S. 559 (1964)" or to insure that "such exercise will [not] unduly interfere with the normal use of public property by other members of the public with an equal right of access to it . . . *Cox* v. *New Hampshire*, 312 U.S. 569 (1941)." (391 U.S. at 320-321) But:

> ". . . the mere fact that speech is accompanied by conduct does not mean that the speech can be suppressed under the guise of prohibiting the conduct. Here it is perfectly clear that a prohibition against trespass on the mall operates to bar all speech within the shopping center to which respondents object. Yet this Court stated many years ago, '[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.' *Schneider* v. *State*, 308 U.S. 147, 163 (1939)." (391 U.S. at 323-324)

Having reaffirmed these propositions, Mr. Justice Marshall turned to the question of whether they were applicable to conduct occurring on a thoroughfare in a privately owned shopping center:

> "This Court held, in *Marsh* v. *Alabama*, 326 U.S. 501 (1946), that under some circumstances property that is privately owned may, at least for First Amendment purposes, be treated as though it were publicly held.
>
> . . . . .
>
> "The shopping center here is clearly the functional equivalent to the business district of Chickasaw in-

> volved in Marsh. . . . Here the roadways provided for vehicular movement within the mall and the sidewalks leading from building to building are the functional equivalents of the streets and sidewalks of a normal municipal business district. The shopping center premises are open to the public to the same extent as the commercial center of a normal town."
>
> . . . . .
>
> "The sole justification offered for the substantial interference with the effectiveness of petitioners' exercise of their First Amendment rights to promulgate their views through handbilling and picketing is respondents' claimed absolute right under state law to prohibit any use of their property by others without their consent. However, unlike a situation involving a person's home, no meaningful claim to protection of a right of privacy can be advanced by respondents here. Nor on the facts of the case can any significant claim to protection of the normal business operation of the property be raised. Naked title is all that is at issue." (391 U.S. at 317, 318, 324)

Mr. Justice Douglas's opinion follows the majority opinion quite closely. Its main feature is the specificity with which it deals with the permissible scope of state regulation of intermixed speech and conduct:

> "Picketing is free speech *plus*, the *plus* being physical matters. Hence, the latter aspects of picketing may be regulated. . . . The courts of Pennsylvania are surely capable of fostering a decree that will insure noninterference with customers and employees while enabling the union members to assemble sufficiently close to Weis' market to make effective exercise of the First Amendment rights." (391 U.S. at 326)

2. Each of the elements of *Logan Valley's rationale* is soundly based on the core values embodied in The First Amendment.

First, the animating principle at work in *Logan Valley* is

that stated by Mr. Justice Roberts in *Hague v. CIO*, 307 U.S. 496, 515 (1939).

> "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."

The underpinning for this principle in practical terms, is that communication on the streets in a business area is proper "precisely because the primary activity for which [they are designed] is attended with noisy crowds and vehicles, some unrest and less than perfect order." *Wolin v. Port of New York Authority*, 392 F.2d 83 (C.A. 2nd Cir. 1968) *certiorari denied* 393 U.S. 940 (1968).

As Professor Kalven has noted (1965 Supreme Court Review *supra*, at 12-13) this view of the matter has an "aura of a large democratic principle. When the citizen goes to the street [to communicate] he is exercising a universal right of a freeman; a kind of First-Amendment easement. [The streets are thus] a public forum that the citizen can commandeer; the generosity and empathy with which such facilities are made available is an index of freedom." This principle is basic to First Amendment law because the "liberty of circulating is as essential to . . . freedom [of speech] as liberty of publishing, indeed, without the circulation the publication would be of little value. *Ex Parte Jackson*, 96 U.S. 727, 733." *Lovell v. Griffin*, 303 U.S. 444, 452 (1938). Allowing the States to close the streets at their discretion to the circulation of free speech would effectively curtail to a substantial degree the uninhibited, robust and wide-open debate to which the First Amendment com-

mits us. *New York Times* v. *Sullivan*, 376 U.S. 254, 270 (1964). It would inhibit the right of expression of those whose means are too limited to utilize methods of communication other than the handbill and the picket sign. It would, therefore, damage the entire society by limiting the opportunities of both the potential publishers and their auditors. And as this Court recognized in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969) meaningful access to the relevant audience is of the essence under the First Amendment:

> "[T]he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount . . . It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC." (395 U.S. at 390)

By the same token, "the rights of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences" require a rule which does not allow the "owner" of a thoroughfare to shut off communication whose message is abhorrent to him, *cf.*, *Lamont* v. *Postmaster General*, 381 U.S. 301, 306-307 (1965). Thus where First Amendment rights are at stake common law property concepts, which would afford the State complete and absolute dominion over the streets, have no legitimate role to play. In this context, as in maritime law, these concepts, whose roots may be traced "to a heritage of feudalism" are not applicable "in an industrialized urban society."

Kovacs v. Compagnie Generale Transatlantique, 358 U.S. 625, 631-632 (1958). Like the common law of libel, property concepts must, in appropriate instances, give way to our devotion to the facilitation of free speech, *cf. New York Times v. Sullivan, supra.*

Moreover as the Court explicitly recognized in *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 163 (1939)) and *Logan Valley*, 391 U.S. at 323; *compare Wolin v. Port of New York Authority, supra*, 392 F.2d at 89-91, the evil which would result from allowing the states to close the streets to the circulation of information is not abated by the fact that they might choose to close only some streets to that activity. The reasons are obvious from the facts of the instant case. Here, the Union was interested in reaching those who intended to trade with Weinacker's. The natural and effective place to do so was on the thoroughfare in front of Weinacker's store. The attempt to communicate with the limited class which the Union wished to reach could be frustrated by a variety of factors if that location was declared off limits. It could be frustrated by the fact that those interested in trading with Weinackers could only be identified as they approached the shopping center, and if they came by automobile, as is likely, their mode of conveyance would insulate them from the Union's message if that message was delivered at the outskirts of the center. It could be frustrated by the fact that the Union's limited manpower and resources would be dissipated if it attempted to reach the entire community in order to make sure that it reached the limited class to whom its message was relevant. It could be frustrated by the fact that a message remote in time and place tends to be drowned in the torrent of information the public receives every day. Indeed, the argument that the opening of other areas to free speech should be taken into account as a justification for restrict-

ing speech elsewhere quickly reduces to an absurdity which justifies every abridgement. For every state and subdivision has power over only a limited geographic area, and unless all act in concert there is always an area, somewhere, open for the circulation of ideas.

Second, *Logan Valley* fuses the teachings of *Hague* v. *CIO* and *Marsh* v. *Alabama*, 326 U.S. 501 (1946). Shopping center thoroughfares have a role to play as public forums because the center "serves as the community business block 'and is freely accessible and open to the people in the area and those passing through.' " 391 U.S. at 318. Mr. Justice Roberts's opinion in *Hague* v. *CIO* recognizes that the vitality of urban life is increased if the hubs of population concentration are utilized to facilitate the traffic in ideas as well as the traffic in goods. It is hospitable to the concept that the pleasure and excitement of civilized city life is enhanced by fostering "the disharmony of controversy" engendered by free speech "because . . . in that unrest [lies] the best prospect of an ordered society." *Wolin* v. *Port of New York Authority*, 392 F.2d at 91.

Marsh is sensitive to this need; it's key insight responds to it: "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." 326 U.S. at 506. For unless *Marsh* had been viewed as the natural development of, and safeguard for, the principles of *Hague* v. *CIO*, the historical right to use the streets for the dissemination of views would have been at the mercy of changes in patterns of land development which leave title to street frontage in the abutting property owner. And today we are witnessing just such changes. The sprawling urban areas our motorized society encourages frequently have no traditional municipally-

owned town center. The commercial life of these areas is centered on a series of privately owned shopping areas, see R. Myers, Suburban Shopping Centers (Small Business Bulletin No. 27, U.S. Small Business Administration, 1963). Thus *Logan Valley*, strikes the balance between access to this natural public forum and "a property right worn thin by the public usage," *Schwatz-Torrence Investment Corp.* v. *Bakery Workers Local 31*, 61 Cal. 2d 766, 394 P.2d 921, *certiorari denied* 380 U.S. 906 in favor of free speech. This balance is plainly in accord with the dominant trend of First Amendment law. "The First Amendment would, . . . be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition, or assembly as such." *Mine Workers* v. *Illinois Bar Assn.*, 389 U.S. 217, 222 (1967). For this reason the leading opinion in *Schneider* v. *State* sets the balance in favor of a broad freedom to circulate views which can only be overcome by a compelling state interest:

> "This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of these rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties. . . . Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions." *Schneider* v. *State*, 308 U.S. at 161.

Naturally there are counters on the other side. They were of little weight in *Logan Valley* and are of equally little

weight here. But that does not mean that there is an inevitable progression from *Logan Valley* to the protection of picketing or pamphleteering inside a store, compare 391 U.S. at 339-340. The historical right at issue here is access to public thoroughfares. Of course, as the opinion in *Wolin v. Port of New York Authority*, which upheld access to a bus terminal, emphasizes, the fact that the thoroughfare in question has, or does not have, a roof over it does not provide a key to the problem but a calculus of interests, based upon a determination of when "the abrasion caused by any protected speech would too greatly interfere with other interests" does. And that calculus of interests does not entail a mindless extension of access for pickets from a multipurpose area such as a street to an area devoted to selling, or to one in which there is a true interest in privacy, see 392 F.2d at 90.

Third, all of the common methods of circulating views to the general public, the distribution of a pamphlet or a newspaper, the use of sound trucks or amplified soap box oratory, the act of addressing a meeting, the use of airwaves to broadcast a radio or television message, the carrying of a placard, have collateral effects qualitatively different from those entailed by a quiet conversation in one's home. Depending on considerations of time, place, manner and circumstances, they may interfere with the interest in unobstructed movement, the desire for uninterrupted quiet, or the right to use a scarce facility to air opposing views. Thus it does no disservice to the cause of free speech to recognize that the right to transmit a message to the public at large is not beyond regulation. It must be subject to rules, such as Robert's Rules of Order, which set reasonable guidelines designed to maximize orderly communication.

Logan Valley articulates the limits that the First Amend-

ment places on such regulation: "the mere fact that speech is accompanied by conduct does not mean that the speech can be suppressed under the guise of prohibiting the conduct," 391 U.S. at 323. Or, as Mr. Justice Douglas noted (391 U.S. at 326), "Picketing is free speech *plus*, the *plus* being physical activity that may implicate traffic and related matters. Hence, the latter aspects of picketing may be regulated." (emphasis in original). The permissible range of regulation does not include the power to create a "sanctuary from which some members of the public may be excluded merely because of the ideas they espouse." Thus the state's freedom to regulate "speech plus," which takes place at an appropriate locus, does not include the right to ban it outright; instead, only regulations designed to accommodate that activity with the interest of all citizens to move freely is permissible.

As *Logan Valley* itself demonstrates, the major practical difficulty of the dichotomy between "pure speech" and "speech plus" is that a number of state courts concluded that "speech plus" was subject to unlimited regulation. This, of course, is inconsistent with this Court's holdings. As a means of communication, picketing is free speech and is entitled to every constitutional protection afforded other forms of circulating views, such as handbilling.

The test in *Thornhill* v. *Alabama*, 310 U.S. 88, 104-105 (1939), that an abridgement of the right to publicize through peaceful picketing or similar activity "can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion," precisely parallels the general rule governing all forms of expression, laid down by

Justice Holmes on behalf of this Court in *Schenck* v. *United States*, 249 U.S. 47, 52 (1919): "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent," *Cf. Dennis* v. *United States*, 341 U.S. 494, 510 (1951). And as the Court observed in *Logan Valley*, 391 U.S. at 313-315, 320-321, not a single holding of this Court regarding the status of picketing in a case subsequent to *Thornhill* departs from the test enunciated in that decision.[1] Thus this aspect of the Courts reasoning, as well as those previously reviewed, pp. 8-14 *supra* demonstrates the continuity of the doctrine embodied in the opinion.

3. The essence of *Logan Valley* is that the First Amendment protects the right of "workers seeking to challenge substandard working conditions, consumers protesting shoddy or overpriced merchandise and minority groups seeking nondiscriminatory hiring policies" to bring their message to their natural audience, the store's customers, at the locus that audience is most likely to be found, the pedestrian thoroughfare at the store's entrance, through peaceful nonobstructive picketing or handbilling. And that businesses should not be allowed to "immunize themselves . . . by creating a *cordon sanitaire* of parking lots around their stores," 391 U.S. at 325. As we have shown, that conclusion is solidly based in reason, in considerations

[1] We naturally do not concede that every picketing case cited in *Logan Valley* was rightly decided. In several instances the Court viewed the factual situation differently from the way we would have viewed it. But this does not affect our submission that, assuming *arguendo* the correctness of the Court's interpretation of the facts and of its evaluation of the object of the picketing, there has been undeviating decisional consistency on the status of picketing as such.

of policy and in this Court's First Amendment decisions prior to *Logan Valley*. Thus there is no legitimate basis for truncating *Logan Valley* as the Alabama courts have attempted to do.

Certainly their invitation to measure constitutional rights by the metes and bounds of the site must be rejected. For it is an open invitation to unprincipled adjudications. And as this Court has recently acknowledged, in labor relations, this invitation has been accepted far too often, *cf. Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, (1969). The strength of this Court's decisions, from *Schneider* v. *State* through *Logan Valley* inheres in the refusal to allow the states to limit the places at which handbilling or picketing may take place on the ground that other places remain open. Since the thrust of the First Amendment is to maximize communication, the law has simply distinguished between appropriate and inappropriate locations for public speech; it has not sought to restrict publishers to a single site that the courts or the states believe to be ideal, necessary or most appropriate. Within these wide limits it is for the individuals involved to determine how best to propagate their message:

> "As we have said the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." Schneider v. State, 308 U.S. at 163.

It is equally plain that the distinction between a single store shopping center and a multi-store center is unsound. No store, no matter how small, fronting on a publicly owned street can constitutionally be immunized from picketing or handbilling directed toward its policies.

There is no reason to free a substantial business such as Weinacker's, from the impact of such activity because of the happenstance that it holds title to the thoroughfare open to the public in front of its store.

As the Supreme Court of California stated in another very similar case, *In re Lane*, 72 LRRM 2286, 2287-2290 (August 20, 1969):

> "In the case at hand we have the identical situation the court warned against [in Logan Valley]. If we were to hold the particular sidewalk area to be 'off limits' for the exercise of First Amendment rights in effect we would be saying that by erecting a 'cordon sanitaire' around its store, Calico has succeeded in immunizing itself from on-the-spot public criticism.
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> * * * *
>
> "Here, the public sidewalk which Calico suggests is available for First Amendment purposes is located some 150-280 feet from the store. The posted speed limit is 40 miles per hour on Monument Boulevard which adjoins that public sidewalk. The customary manner by which customers reach the market is by automobile and use of the parking lot. Thus, the difficulties and hazards to those attempting to exercise First Amendment privileges are as present here as they were in Logan Valley.
>
> "The only significant distinction between [*Logan Valley; Schwartz-Torrance Inv. Corp.* v. *Bakery & Confectionery Workers' Union* (1964) 61 Cal., 2d 766; *In Re Hoffman* (1967) 67 Cal. 2d 845] and the instant case is the more limited purposes for which the particular sidewalk is designed to serve; here, the customers of one store, and in the other cases customers of two or more stores, or as a route of access to other places or purposes. Certainly, this sidewalk is not private in the sense of not being open to the public. The public is openly invited to use it in gaining access to the store and in leaving the premises. Thus, in our view it is a public area in which members of the public may exer-

> cise First Amendment rights. . . . Certainly the paramount and preferred place given to the First Amendment freedom of speech right in our democratic system . . . should be accorded precedence over the mere 'naked title' . . . of market owner Stewart's interest in the premises.

* * *

It is the Supreme Court of California and not the Supeme Court of Alabama, which has captured the principled basis of *Logan Valley*. It's decision and not that of the court below points the way to the proper disposition of the instant case.

CONCLUSION

For the above-stated reasons, as well as those set out by the Petitioners, the decision of the court below should be reversed.

Respectfully submitted,

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